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MUHAMAD SUKERI MAHUDIN v. HICOM AUTOMOTIVE MANUFACTURERS (MALAYSIA) BHD & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
B AZIZAH NAWAWI JCA
LEE HENG CHEONG JCA
[CIVIL APPEALS NO: W-01(A)-618-10-2019, W-01(A)-619-10-2019, W-01(A)-622-11-2019, W-01(A)-623-11-2019 & W-01(A)-624-11-2019]
C 23 NOVEMBER 2020

LABOUR LAW: *Employment – Dismissal – Whether with just cause or excuse – Misconduct – Participation in assembly of workers' union – Whether illegal picket – Whether participation in union activity immunise employees from disciplinary*
D *action – Whether punishment proportionate with misconduct – Whether misconduct proven – Whether warranted punishment of dismissal*

LABOUR LAW: *Trade Union – Collective agreement – Negotiation on proposed collective agreement – Whether there was deadlock – Whether there was trade dispute – Termination of employment for participation in assembly organised by*
E *worker's union – Whether proportionate with misconduct – Whether misconduct proven – Whether warranted punishment of dismissal*

The appellants were employees of the first respondent prior to their dismissal and they were members of the National Union of Transport Equipment and
F Allied Industrial Workers ('Union'). Upon the expiry of the collective agreement between the Union and the first respondent on 30 June 2014, a proposal for a collective agreement for the period of 1 July 2014 until 30 June 2017 was sent to the first respondent by the Union on 1 April 2014. After unsuccessful meetings between the Union and the first respondent, the appellants and other members of the Union were informed that a briefing will
G be held on 4 December 2015 to update the Union members of the new development in the Collective Agreement negotiations. On being aware of the assembly, the first respondent's management took steps to remind the employees not to attend the assembly and stated that disciplinary action would be taken against anyone who attended the assembly. On the said date,
H the assembly took place with the participation of the Union officials and the appellants thus leading to the issuance of show cause letters to the appellants as to why disciplinary action should not be taken against them. The appellants replied to the show cause letters disputing the allegations against them. Dissatisfied with the appellants explanations, the first respondent

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issued the notice for a domestic inquiry against the appellants after which the appellants were found guilty of the charges levelled against them and were thus dismissed. The appellants' appeal against the dismissal order were dismissed. Aggrieved, the appellants filed their representations for wrongful termination to the Industrial Relations Department pursuant to s. 20(1) of the Industrial Relations Act 1967 ('IRA') and the appellants' representations were forwarded to the Minister who in turn referred the matter to the Industrial Court ('IC') for determination pursuant to s. 20(3) of the IRA. Having heard the evidence and submissions by both parties, the IC decided that the first respondent had established the charges and that the dismissal of the appellants were with just cause and excuse ('impugned awards'). Aggrieved by the impugned awards, the appellants applied for the curial intervention of the High Court by way of applications for judicial review and, having heard the applications by the appellants, the High Court dismissed the appellants' applications. Hence, the appeals.

Held (dismissing appeal with costs)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) The Chairman of the IC had, after considering the charges levelled against the appellants and the evidence produced, made a finding of facts that the negotiation with regard to the proposed collective agreement by the Union had not come to a deadlock. The IC also found that the first respondent had not received any notification of a deadlock from the Union. The so-called letter informing the first respondent of the deadlock was never received by the first respondent and was not proven to have been served on the first respondent. The purported letter was also not produced by the Union during the domestic inquiry proceeding. Hence, the allegation of misconduct by the appellants had been proved. The IC had made correct findings of facts in respect of each appellant upon direct evidence, photographs and CCTV footage. The IC did not commit any error of law in its findings of facts in respect of the appellants' misconduct. (paras 27 & 31)

(2) The appellants were reminded and warned by the management of the first respondent to refrain from participating in the assembly and were told that failure to comply with the warning would lead to disciplinary action against them. Further, the assembly was held by the side of the main road and therefore, attracted unwanted attention from members of the public where speech was given using a loudhailer and participants wearing the first respondent's uniform and wearing face masks which defied industrial harmony and lowered the first respondent's reputation. The Chairman of the IC had considered all the facts and circumstances of this case and viewed that the act of the appellants had tarnished the

first respondent's image, whether directly or indirectly and tantamount to a serious act of misconduct. The appellants' misconducts were so serious and had destroyed the trust and confidence the first respondent placed on the appellants and warranted the appellants' dismissal. (paras 33-35)

Case(s) referred to:

Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors [2015] 5 CLJ 1 FC ***(refd)***

Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2014] 4 ILR 241 FC ***(refd)***

In The Matter Of Cargo Handling Corporation Ltd v. Cargo Handling Corporation Staff Union [1965] 1 LNS 62 HC ***(refd)***

Ismail Nasaruddin Abdul Wahab v. Malaysia Airline System Bhd & Anor [2020] 6 CLJ 354 HC ***(refd)***

Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia v. Renesas Semiconductor (KL) Sdn Bhd [2016] 2 ILR 138 ***(refd)***

Kuantan Beach Hotel Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2004] 6 CLJ 18 HC ***(refd)***

Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 4 ILR 477 FC ***(refd)***

Nur Rasidah Jamaludin v. Malayan Banking Bhd & Other Appeals [2018] 1 CLJ 330 CA ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 18(1), 20(1), (3), 40(1)

For the appellants - R Chandrasegaran; M/s Prem & Chandra
For the 1st respondent - N Sivabalah & Jannie Goh; M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Muhamad Sukeri Mahudin v. HICOM Automotive Manufacturers (Malaysia) Sdn Bhd & Anor [2019] 1 LNS 2161 (affirmed).]

Reported by S Barathi

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] There are five related appeals before us against the decision of the High Court Judge at Kuala Lumpur in refusing to issue an order of *certiorari* to quash the awards of the Industrial Court which was handed down on 13 March 2019.

[2] After due deliberations and considerations of the parties' submissions, both oral and written, the appeal records, the relevant awards of the second respondent as well as the decision of the learned High Court Judge, we unanimously dismissed all the appeals for the following reasons.

Background Facts

[3] All the appellants were employees of the first respondent prior to their dismissal and they were members of the National Union of Transport Equipment and Allied Industrial Workers ("the Union").

[4] As the collective agreement between the Union and the first respondent had expired on 30 June 2014, a proposal for a collective agreement for the period of 1 July 2014 until 30 June 2017 was sent to the first respondent by the Union on 1 April 2014.

[5] Several meetings were held between the Union and the first respondent concerning the proposed collective agreement but had not reached any agreement. The appellants, together with other members of the Union, were then informed that a briefing will be held on 4 December 2015 to update the Union members of the new development in the collective agreement negotiations.

[6] The first respondent's management heard that an assembly would be held on 4 December 2015, took steps to remind the employees not to attend the assembly otherwise disciplinary action would be taken against them who attended the said assembly.

[7] On 4 December 2015 between 5.30pm and 6.30pm, the Union officials and its members including all the appellants, had assembled at the car park outside the first respondent's premises, facing the main public road of Jalan Pekan and Kuantan, Pahang.

[8] Pursuant to the assembly attended by all the appellants, the first respondent issued show cause letters dated 6 January 2016 to all the appellants to explain as to why disciplinary action should not be taken against them. The allegation against all the appellants was:

> Pada 4hb Disember 2015 di antara pukul 5.30 ptg hingga 6.30 ptg, anda didapati telah mendorong atau mempengaruhi pekerja-pekerja kilang dalam anggaran 110 orang atau lebih berkumpul ramai-ramai di hadapan kawasan hadapan ICAM lama (sebelah kilang HAMM), di mana tindakan anda ini memberikan gambaran bahawa ada wujudnya ketidakharmonian perhubungan perusahaan dalam syarikat yang boleh memberikan tanggapan yang negatif kepada orang awam terhadap syarikat.
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> Dengan ini anda telah melanggar peraturan syarikat di bawah kesalahan berat lampiran DTT-2 (35) & (48) seperti berikut:
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> > DTT 35: menjatuhkan imej atau nama baik syarikat melalui apa-apa cara samaada secara lisan, tulisan atau perbuatan.
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> > DTT 48: membawa atau cuba membawa apa-apa bentuk pengaruh atau tekanan luar untuk mengemukakan atau menyokong sesuatu tuntutan berhubung dengan perkhidmatan samaada tuntutan itu tuntutan perseorangan atau tuntutan lain-lain kakitangan.

[9] By a letter dated 12 January 2016, the appellants replied to the show cause letters disputing the allegations. Dissatisfied with the appellants' explanations, the first respondent issued the notice for a domestic inquiry dated 14 January 2016 to the appellants to attend the domestic inquiry on 22 January 2016.

[10] On 22 January 2016, the domestic inquiry proceeding was held and the appellants were found guilty of the charges levelled against them. Thereafter, by a letter dated 3 February 2016, the first respondent dismissed all the appellants with effect from 5 February 2016. Substantially the dismissal letter reads as follows:

> Pada 4hb Disember 2015 di antara pukul 5.30 ptg hingga 6.30 ptg, anda didapati telah mendorong atau mempengaruhi pekerja-pekerja kilang dalam anggaran 110 orang atau lebih berkumpul ramai-ramai di hadapan kawasan hadapan ICAM lama (sebelah kilang HAMM), di mana tindakan anda ini memberikan gambaran bahawa ada wujudnya ketidakharmonian perhubungan perusahaan dalam syarikat yang boleh memberikan tanggapan yang negatif kepada orang awam terhadap syarikat.

[11] All the appellants' appeal against the dismissal order were dismissed. Aggrieved, the appellants filed their representations for wrongful termination to the Industrial Relations Department pursuant to s. 20(1) of the Industrial Relations Act 1967 ("IRA 1967"). The appellants' representations were forwarded to the Minister who in turn referred that matter to the Industrial Court ("IC") for determination pursuant to s. 20(3) of the IRA 1967.

[12] Having heard the evidence and submissions by both parties, the IC decided that the first respondent had established the charges and that the dismissal of all the appellants were with just cause and excuse ("the impugned awards").

[13] Being aggrieved by the impugned awards, the appellants applied for the curial intervention of the High Court, Kuala Lumpur by way of applications for judicial review.

[14] The High Court, having heard all the applications by the appellants on 30 September 2019, dismissed the appellants' applications. In his written grounds of judgment, the learned High Court Judge stated *inter alia* as follows:

> [42] Having considered the applicants' misconduct and the totality of evidence, I agree with the Industrial Court as to the seriousness of the misconduct and has no reason to interfere with the punishment by the Industrial Court.

Our Deliberations And Decisions

[15] Learned counsel for the appellants submitted that the High Court Judge had erred in fact and/or in law when he failed to find that the second respondent erred in law and/or fact when it failed to give due consideration to the legal principles of pleadings upon finding that the meeting on 4 December 2015 for all intents and purposes, is a picket even though first respondent had not pleaded this issue and/or the involvement of the appellants in the purported picket. It was further argued that the participation in an unlawful picket was not the essence/ingredient of the charge preferred against the appellants and as such ought not to be considered by the IC.

[16] In his submission, learned counsel for the appellants referred to the case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 where the Federal Court emphasised the importance of the basic rules of pleading as follows:

> [28] There is no doubt that the underlying objectives and purposes of the Act is to ensure social justice to both employers and employees and to advance the progress of industry by bringing harmony and cordial relationship between the parties and to eradicate unfair labour practices, to protect workmen against victimisation by employers and to ensure termination of industrial disputes in a peaceful manner (see *Tanjung Jara Beach Hotel Sdn Bhd v. National Union of Hotel & Bar Restaurant Workers Peninsular Malaysia* [2004] 4 CLJ 657). However, as rightly pointed out by learned counsel for the respondent s. 30(5) of the Act cannot be used to override or circumvent the basic rules of pleading. The Industrial Court, like the civil courts must confine itself to the four corners of the pleading. This had been held to be so by this court in *Rama Chandran* which are as follows:
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> > It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues.
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> [29] There is no reason to depart from the above view. Pleadings in the Industrial Court are as important as in the civil courts. The appellant must plead its case and the Industrial Court must decide on the appellant's pleaded case. This is important in order to prevent element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded. Thus, the Industrial Court's duty, to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form under s. 30(5), does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principle Act. Rule 9 provides as follows:

A Statement of Case

(1) Upon a case being brought before the Court, the Registrar shall immediately serve notice in Form H on one or other of the parties as the President shall direct to submit to the Court a Statement of Case.

B [30] Rule 9(3) specifically prescribes the contents of a statement of case. It reads:

(3) Such Statement of Case shall be confined to the issues which are included in the Case referred to the Court by the Minister or in the matter required to be determined by the Court under the provisions
C of the Act and shall contain:

(a) a statement of all relevant facts and arguments;

(b) particulars of decisions prayed for;

(c) an endorsement of the name of the first party and of the first party and of his address for service; and
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(d) as appendix or attachment, a bundle of all relevant documents relating to the case.

[17] It was further submitted that the court below had failed to take into account the following undisputed facts, and if the court below had done so,
E it would have had reached a different conclusion. The undisputed facts are as follows:

(i) that the appellants are members of the trade union, the Union Worksite Committee of the Union and members of the Union Executive Council ("Exco") member and are therefore protected by
F law as a trade unionist and as an Exco member of the Union ("officer of a trade union"), to participate in the lawful activities of trade unions;

(ii) that it was the Union Headquarters ("Union HQ") which organised and convened the meeting on 4 December 2015 to brief or
G communicate with members of the Union working with first respondent on the status of the collective agreement negotiations;

(iii) the appellants' evidence that the briefing was organised by the Union HQ and was outside the purview of the appellants;

H (iv) that there is no legal impediment for the appellants to attend a briefing organised by the Union relating to the terms and conditions of employment with the first respondent;

(v) direct violation of the appellants' fundamental and/or basic human rights enshrined in the Federal Constitution;
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(vi) that there is no legal impediment to the Union communicating and/or sharing information with Union members after working hours outside the premises of the first respondent and/or to be briefed by the Secretary-General/officers of the Union;

(vii) there is no requirement and/or legal obligation for the appellants to seek permission from the first respondent to attend a briefing organised by the Union outside working hours and outside the premises of the first respondent; and

(viii) the action of the first respondent is in violation of the law relating to industrial relations considering that the first respondent had sent warnings to prevent employees including the appellants from attending the briefing organised by the Union HQ and to those who refused to comply, disciplinary action will be taken against them. In fact, the first respondent also briefed all its employees reminding them of the implications or consequences of attending the Union's gathering.

[18] Learned counsel contended that the IRA 1967 and the Trade Unions Act 1959 *inter alia* protect from termination, the taking of disciplinary action or the discrimination against union members participating in lawful union activities. In support of that proposition learned counsel for the appellants relied on *Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia v. Renesas Semiconductor (KL) Sdn Bhd* [2016] 2 ILR 138 and *Ismail Nasaruddin Abdul Wahab v. Malaysia Airline System Bhd & Anor* [2020] 6 CLJ 354.

[19] The appellant's third ground of appeal was based on the finding of the court below that there was no trade dispute existed. Learned counsel for the appellants argued that the learned High Court Judge erred in fact and law when His Lordship decided:

(i) in relation to trade disputes, s. 18 of the IRA 1967, 'deadlock', 'picket'/'illegal picket' and whether members of the Union have the right to gather after work hours outside the premises of the first respondent to attend a briefing from the Secretary-General/officers of the Union;

(ii) in deciding the appellants must rely on s. 18(1) of the IRA 1967 before organising the assembly on 4 December 2015;

(iii) in concluding that as there was no declaration of deadlock/impasse by the appellants to the first respondent hence no trade dispute arose so there was no basis for the Union to organise a rally on 4 December 2015;

(iv) in concluding that no trade dispute exists although it is clear from the testimony of the first respondent's witness that after the explanation was given in a meeting to the Exco of the Union HQ, the Union refused to accept first respondent's explanation, negotiations on the proposed fourth collective agreement were not concluded by both parties effectively means that there exists a trade dispute between the Union and the first respondent;

(v) in concluding that no trade dispute had arisen as such the assembly on 4 December 2015 was purportedly an unlawful picket although the IC accepted the evidence "... the briefings were all about the impasse on the negotiations for the fourth collective agreement and their dissatisfaction in respect of the refusal of the company to accede to the Union's demands under the proposed fourth collective agreement";

(vi) in concluding that unions are not entitled to picket without first complaining to the Director General of the Department of Industrial Relations ("DGIR") as purportedly provided for under s. 18(1) of the IRA 1967 and the collective agreement;

(vii) in concluding that even if there had been a trade dispute, then what the Union ought to have done was to bring this matter up to the DGIR as purportedly provided under s. 18(1) of the IRA 1967 and also the collective agreement; and

(viii) the Union and the first respondent could not reach agreement on some of the articles of the collective agreement and thus the new collective agreement could not be reached by both parties at the material time. Clearly a 'trade dispute' subsists or had arisen between the parties. In this case either party may report the dispute to the DGIR.

[20] On the same issue, learned counsel for the appellants submitted that the IC had gone on a frolic of its own and had misconstrued the application of s. 18(1) of the IRA 1967 as if to suggest that the Union should have reported the trade dispute to the DGIR before organising the said assembly or in the event of a deadlock. Learned counsel relied on this court's decision in *Nur Rasidah Jamaludin v. Malayan Banking Bhd & Other Appeals* [2018] 1 CLJ 330; *Kuantan Beach Hotel Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2004] 6 CLJ 18; *In The Matter Of Cargo Handling Corporation Ltd v. Cargo Handling Corporation Staff Union* [1965] 1 LNS 62; and *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2014] 4 ILR 241. Besides that, learned counsel further relied on the Peaceful Assembly Act 2012 which states that this Act shall not apply to an assembly which is a strike, lock-out or picket under the Industrial Relations Act 1967 (Act 177) and the Trade Unions Act 1959 (Act 262).

[21] It was therefore contended by learned counsel for the appellants that the termination of the appellants' employment was without just cause or excuse and that the punishment of dismissal meted out by IC was too harsh and not proportionate to the alleged misconduct committed. It was the appellants' contention that the learned High Court Judge, in affirming the decision of the second respondent had failed to:

(i) consider the consequential effect on industrial relations law and/or of the law applicable specifically to trade unions and/or trade unionists involved in trade union activities;

(ii) give effect to the law providing protection, which cover the rights of workers to participate in the lawful activities of trade unions, without interference in the functioning and in the administration of trade unions;

(iii) consider the appellants' testimony that when the Union HQ decided to hold a briefing as a result of a break down in the collective agreement negotiations, there was no need for the Union to seek permission from the first respondent to meet the members of the Union outside of working hours, outside the first respondent's premises and further considering the Union had not organised a picket and was merely a briefing;

(iv) there had been ongoing negotiations between the Union and the first respondent regarding new terms and conditions of employment to be incorporated into the fourth collective agreement for members of the Union working with the first respondent; and

(v) that the Union and the first respondent could not reach agreement on some of the articles of the collective agreement as such a new collective agreement could not be concluded by both parties at that material time. Clearly a 'trade dispute' subsists or had arisen between the parties. In this case either party may report the dispute to the DGIR.

[22] Learned counsel for the appellants argued that since the IRA 1967 is a piece of beneficial social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen, such legislation must receive a liberal and not a restricted interpretation. In support, learned counsel for the appellants referred to us the decision of the Federal Court in *Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors* [2015] 5 CLJ 1 where it was held that:

> [32] Our courts had, on numerous occasions expressed the views that such awards must be decided in accordance with **s. 30(5) of the Act**. Ordinary rules of construction do not apply in interpreting the terms of a collective agreement: See *Kesatuan Pekerja-Pekerja Perkayuan v. Syarikat Jengka Sdn Bhd, supra*. In ***Tanjong Jara Beach Hotel Sdn Bhd v. National***

A *Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia* **[2004] 4 CLJ 657** the Federal Court once again emphasized that the Industrial Court in applying its powers under **s. 30(5) of the Act** has to bear in mind the underlying objectives and purposes of the Act, which is a piece of legislation to ensure social justice for both employers and employees and to advance the progress of industry by bringing about harmony and
B cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner.

(emphasis added)

[23] Finally, learned counsel for the appellants submitted that even in the
C event that this court comes to a conclusion that the appellants were involved in an unlawful picket, which is denied, applying the principle enunciated in *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 4 ILR 477 where it was decided that the punishment of dismissal is extreme under the circumstances. Learned counsel also raised the issue of disparity of punishment where some
D of the employees who had also attended the assembly had been dismissed but were later reinstated.

[24] In *Harianto Effendy Zakaria* (*supra*), the Federal Court had said about the function of the IC:

E [33] It is trite law that the function of the Industrial Court under s. 20 of the Industrial Relations Act 1967 is twofold, first, to determine whether the alleged misconduct has been established, and secondly whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues on its merits would be jurisdictional error which would merit interference by *certiorari* by the High Court (see *Milan Auto*
F *Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537).

[25] Learned counsel for the first respondent submitted that the learned High Court Judge did not err when he concluded that no deadlock existed when the appellants attended the assembly on 4 December 2015 and consequentially no trade dispute existed. Therefore the assembly on
G 4 December 2015 was an illegal picket. It was also submitted that the IC had correctly held that the appellants' dismissal from the employment with the first respondent were justified. Learned counsel for the first respondent further contended that the appellants' participation in the union activity does not immunise the appellants from disciplinary action.

H **[26]** Learned counsel for the first respondent also contended that there is no issue of disparity of punishment against the appellants and that the punishment imposed were proportionate with the offence committed.

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[27] From the appeal records, we observed that the Chairman of the Industrial Court had after considering the charges levelled against the appellants and the evidence produced, made a finding of facts that the negotiation with regard to the proposed collective agreement by the Union had not come to a deadlock. It was also the finding of the second respondent that the first respondent had not received any notification of a deadlock from the Union. The so-called letter dated 3 December 2015 informing the first respondent of the deadlock was never received by the first respondent and was not proven to have been served on the first respondent. The purported letter was also not produced by the Union during the domestic inquiry proceeding.

[28] The Industrial Court, in our view was correct when it held that:

> [22] CLW-6 identified the letter dated 3rd December 2015 at page 5 of CLB-1 as the Union's letter to the Company informing that the Union was declaring a deadlock. It is pertinent to note that this letter was purportedly sent to the Company one day before the assembly was held on 4th December 2015. CLW-6 testified that the letter was sent by fax. However, there was no proof of receipt or a fax transmission report produced before this Court that the letter was indeed sent to the Company on 3rd December 2015. Furthermore, the Company's witnesses had testified that the Company did not receive the Union's said letter of 3rd December 2015. In the absence of any form of documentary evidence to substantiate CLW-6's claim, the only conclusion that this Court can arrive at is that the Company was not informed of the purported declaration of deadlock. As such, no deadlock existed as declared by the Union as the Company was not notified of the same. Since there was no deadlock, then there was no basis whatsoever for the Union to resort to holding and attending the assembly on 4th December 2015. CLW-6 also testified that the reason why the assembly was held on 4th December 2015 was to brief or communicate to the members of the Union on the status of the negotiation on the collective bargaining.
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> [23] Picketing is where a group of people, in most cases consisting of trade union members, stand outside their work place in order to protest about something, or to prevent people from going into the work premises, or to persuade workers to join a strike. The claimant herein contends that the assembly was held on 4th December 2015 to merely brief the Union members. However, it was evident that the briefings were all about the impasse on the negotiations for the 4th Collective Agreement and their dissatisfaction in respect of the refusal of the Company to accede to the Union's demands under the proposed 4th Collective Agreement. Thus, the assembly on 4th December 2015 for all intents and purposes was a picket.

[29] The decision of the Industrial Court was founded on s. 40(1) of the IRA 1967 which provides as follows:

> Picketing
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> 40(1) Without prejudice to section 39, it shall be unlawful for one or more persons acting on his or their behalf or on behalf of a trade union or of an employer in furtherance of a trade dispute to attend at or near any place:
>
> Provided that it shall not be unlawful for one or more workmen to attend at or near the place where the workman works and where a trade dispute involving such workman exists only for the purpose of peacefully:
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> (i) obtaining or communicating information; or
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> (ii) persuading or inducing any workman to work or abstain from working,
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> and subject to such attendance being not in such numbers or otherwise in such manner as to be calculated:
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> (a) to intimidate any person;
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> (b) to obstruct the approach thereto or egress therefrom; or
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> (c) to lead to a breach of the peace.

[30] It is trite law that the High Court is not obliged to interfere with the findings of the IC unless such findings are so unreasonable that no reasonable man could reasonably arrive at such findings. This principle of law had been lain down by Gopal Sri Ram JCA (as he then was) in *William Jacks & Co (M) Sdn Bhd v. S. Balasingam* [1997] 3 CLJ 235 to which we reproduce below:

> Before us, Sivabalah, with his usual meticulous care, has taken us through several passages in the testimony of the witnesses who gave evidence in the Industrial Court. He has attacked the learned Judge's refusal to issue *certiorari* on a number of grounds. I find it, however, unnecessary to delve into each of them. Suffice to say that the complaints made by Sivabalah amount to a criticism of the findings of fact made by the Industrial Court based upon the credibility of the witnesses it saw and heard.
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> It is well-settled that a Court cannot utilise *certiorari* proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v. Nagappa* AIR [1954] SC 440 and in *Dharangadhra Chemical Works Ltd. v. State of Saurashtra & Others* AIR [1957] SC 264.

In response to this proposition, Sivabalah refers us to the decision of this Court in *Amanah Butler (M) Sdn. Bhd. v. Yike Chee Wah* [1997] 2 CLJ 79 and the decision of the Federal Court in *Rama Chandran* (*supra*). I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself.

The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran* and *Amanah Butler* (*supra*) may be, it does not include the review, in *certiorari* proceedings, of findings of fact based on the credibility of witnesses.

We are therefore in agreement with learned Judge's refusal to enter upon a domain expressly reserved by law to the Industrial Court. The issue before that Court was whether there was a genuine retrenchment exercise *vis-a-vis* the respondent. Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action" (per S.K. Das J in *Hariprasad v. Divelkar* AIR [1957] SC 121 at p. 132).

Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.

[31] Coming back to the issue of misconduct of the appellants, we are satisfied that the allegation of misconduct by the appellants had been proved. We agreed with the finding made by the learned High Court Judge that the Industrial Court had made correct findings of facts in respect of each appellant upon direct evidence, photographs and CCTV footage. We agree with the learned High Court Judge that the Industrial Court did not commit any error of law in its findings of facts in respect of the appellants' misconduct.

[32] In his grounds, the learned High Court Judge made the following observations and findings:

[27] Flowing from this, as there was no deadlock and no trade dispute existed, there is no legal justification to hold the said assembly on 4.12.2015, which was attended by all the applicants. In the circumstances, the applicant has attended an unlawful picket as found by the Industrial Court. The applicants cannot rely on section 40(1) of the IRA 1967 for attending the said assembly.

A [28] This issue of illegal picket is a question of law and the issue has been argued before the Industrial Court. Hence, the question of whether this issue has not been pleaded does not arise.

[29] Coming back to the issue of the applicants misconduct, the established facts on direct evidence, photographs and CCTV footage in this case are the following:

B

(i) All employees of the 1st respondent including the applicants have been warned by the 1st respondent's management not to attend the assembly on 4.12.2015 and disciplinary action would be taken against those who attended;

C (ii) The applicants attended the assembly on 4.12.2015 between 5.30 pm to 6.30 pm at the carpark facing public road of Jalan Pekan and Kuantan;

(iii) The assembly was also attended by 110 employees;

D (iv) The assembly had caused traffic congestion and attracted public attention. This has also caused by the presence of police officers at the assembly;

(v) There were attendees who attended the assembly wearing helmet and covering their faces with handkerchief;

E (vi) The applicants' wore company's shirts during the said assembly; and

(vii) The applicants, Muhamad Sukeri bin Mahudin and Haikhidil bin Jamaluddin were seen to have called and instructed other employees to join the assembly.

[30] Here, the applicants' action clearly has brought disrepute to the 1st respondent's reputation and an action to obtain influence from outside to support the demand made in the propose Collective Agreement although the 1st respondent's management has explained the financial situation of the 1st respondent.

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[31] As such, the Industrial Court's finding that the applicants' action is in breach of Rules 35 and 48 of the OTT is correct.

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[33] Now we come to the second main issue in this appeal before us as submitted by both parties ie, whether the proven misconduct warranted the punishment of dismissal. This issue involved the rules of harshness and proportionality. In this instant appeal, learned counsel for the appellants also raised an issue of disparity of sentence. It was not disputed that the appellants were reminded and warned by the management of the first respondent to refrain from participating in the assembly and that failing which the first respondent would take necessary disciplinary action. It was also not disputed the facts that the assembly was held by the side of the main road had attracted

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unwanted attention from members of the public where speech was given using a loudhailer and participants wearing the first respondent's uniform and wearing face masks which depict industrial disharmony and lowered the first respondent's reputation.

[34] The Chairman of the Industrial Court had considered all facts and circumstances of this case, and viewed that the act of the appellants had tarnish the first respondent's image, whether directly or indirectly, tantamount to a serious act of misconduct. At the end, the Chairman of the Industrial Court said in his judgment:

> [47] And further, even if the assembly was held after working hours, it is still incumbent upon the Claimant to conduct himself in such a manner so as not to bring disrepute to the Company's image *(Perwira Habib Bank Berhad v. Yusoff bin Zakaria* [1995] 1 ILR 136). The very act of the Claimant in resorting to wear a face mask, *albeit* a handkerchief, projects an image that the Company's employees are largely unruly individuals working in a Company that is bereft with employment problems. This clearly tarnishes the Company's reputation. And at that point in time, whether the assembly was being conducted peacefully or otherwise becomes irrelevant under the circumstances.

[35] The learned High Court Judge agreed with the Industrial Court's decision that the punishment of dismissal of all the appellants were proportionate to the nature and gravity of the appellants' misconduct. Without doubt the appellants' misconduct were so serious which had destroyed the trust and confidence of the first respondent placed on the appellants which warrants for the appellants' dismissal.

[36] We agreed with the learned High Court Judge's observations in affirming the punishment imposed by the Chairman of the Industrial Court when His Lordship stated:

> [39] Next, on the applicants' dismissal, the Industrial Court has taken into consideration to the seriousness of the applicants' misconduct which has tarnished the 1st respondent's image and in contravention of the Rules 35 and 48 of the OTT. The Industrial Court then finds that punishment of dismissal was proportionate to the nature and gravity of the applicants' misconduct.
>
> [40] Clearly the applicants' misconduct had destroyed the trust and confidence the 1st respondent's placed on the applicant which warrants for the applicant's dismissal.
>
> (see *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409).
>
> [41] On this justification for dismissal, Lord Esher MR in *Pearce v. Foster* [1886] 17 QBD 536, said this:

> The rule of law is that where a person has entered into the position of a servant, if he does anything incompatible with the due and faithful discharge of his duty to his master, the latter has the right to dismiss. The relation of master and servant shall be in a position to perform his duty faithfully, and if by his own act he prevents himself from doing so, he latter may dismiss him.

Lopes LJ in the same case then said this:

> If servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal.

[42] Having considered the applicants' misconduct and the totality of evidence, I agree with the Industrial Court as to the seriousness of the misconduct and has no reason to interfere with the punishment by the Industrial Court.

[37] Lastly, on the smaller issue of disparity of punishment where 27 other employees who were also had attended the assembly on 4 December 2015 had been dismissed but later reinstated, this was considered by the learned Chairman of the Industrial Court. In his judgment, the learned Chairman explained:

> [48] The Claimant had raised the issue of disparity of punishment where 27 other employees who also had attended the assembly on 4th December 2015 had been dismissed but later reinstated. Firstly, no evidence was produced by the Claimant with regards to the charges of misconduct levelled against the said 27 other employees. Secondly, COW-3 explained that the charges against the other 27 employees was different from the charge against the Claimant. The Claimant's misconduct was deemed more serious due to his active participation in the said assembly.
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> ...
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> [50] The Court finds that the punishment of dismissal against the Claimant was proportionate to the nature and gravity of the misconduct committed by the Claimant.

[38] The learned High Court Judge held that the issue of disparity of punishment was not relevant. The learned High Court Judge opined:

> [43] On the issue of disparity of punishment as 27 of the employees who also attended the assembly had been dismissed but later were reinstated, I find it is not a relevant consideration in the present case.
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> [44] This has been explained in *Ranjit Kaur a/p S. Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] MLJU 88, which held as follows:

All the above are the relevant matter which the Industrial Court had failed to take into consideration. Instead, it took into consideration other irrelevant matters. A clear example was when it took into account the fact that the respondent's action in not taken action against another employee for a similar misconduct amounted to a display of double standard. With utmost respect, such conclusion is to clear error. As rightly pointed out by the learned High Court Judge that such consideration was irrelevant as it was not for the appellant to question why the respondent as the employer should take disciplinary action against her and not another.

[45] In addition, I find the ultimate decision of the Industrial Court is correct and in accordance with equity, good conscience and substantial merits of the case as required under section 30(5) of the IRA 1967.

Conclusion

[39] Premised on the above stated reasons, we did not find that the learned High Court Judge erred in refusing to issue the order for *certiorari*. We find the learned High Court Judge was entirely correct when His Lordship made a finding that the Industrial Court decision had not suffered any infirmities of illegality, irrationality, procedural impropriety or disproportionality.

[40] We therefore dismissed the appellants' appeal with a single costs of RM10,000 subject to payment of allocator fees.

[41] We so ordered.